United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21[illegible]107

Abraham Williams, Appellant

v.

United States of America, Appellee

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOHN C. SCOTT

1730 Rhode Island Ave., N.W.
Washington, D.C., 20036

Attorney for Appellant
(Appointed by this Court)

QUESTIONS PRESENTED

1. Whether the District Court deprived the defendant of his plea of self-defense to a manslaughter charge by erroneously barring the admission in evidence of an earlier inconsistent statement offered to impeach a prosecution witness; by improperly limiting defense counsel in the presentation of character evidence; by refusing, in charging the jury, to give appropriate emphasis to the subjective nature of a valid claim of self-defense; by unduly stressing the government's second-decree murder charge in instructions to the jury; and by misleading the jury as to the significance of the defendant's possession of a penknife in determining his state of mind.

2. Whether there is a valid basis in the government's evidence for the jury's rejection of defendant's claim of self-defense.

INDEX

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABRAHAM WILLIAMS, Appellant	)	
v.	)	No. 21362
UNITED STATES OF AMERICA, Appellee	)	

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was indicted under D.C. Code § 22-2403 for second-decree murder. The District Court had jurisdiction by virtue of D.C. Code § 24-401.

Appellant was convicted of the lesser included offense of manslaughter and was sentenced to imprisonment for a term of two to six years. He is free on bond pending this appeal. The District Court, after a hearing, granted the appellant, upon his seasonable affidavit, leave to proceed on appeal without prepayment of costs. Jurisdiction is vested in this Court to decide this appeal by virtue of 28 U.S.C. §§ 1291 and 1294.

STATEMENT OF CASE

After a two-day trial, July 24 and 25, 1967, appeliant was convicted by a jury of manslaughter for the June 23, 1966, death of Wilbert Edwards as the result of a knife wound. It was not contested at the trial that the knife wound was inflicted by the defendant. Rather, defendant, who took the stand in his own defense, sought to show that he inflicted the wound in self-defense.

Much of the evidence on which defendant relied to establish self-defense is uncontroverted in the record: (1) that defendant and deceased had been rivals for the affections of the same woman (Tr. pp. 197, 233); (2) that deceased had expressed anger about defendant's association with her (Tr. 197); (3) that deceased was physically a larger man than the defendant (Tr. pp. 6 and 73); (4) that deceased had threatened defendant at an earlier meeting (Tr. pp. 210-212); (5) that deceased owned a revolver (Tr. pp. 45-49, 133); (6) that the defendant knew deceased owned a pistol (Tr. 210-212); (7) that defendant tried to avoid (Tr. pp. 236-7) and it was deceased who sought (Tr. p. 42) the meeting that led to the knifing; and (8) that defendant, having struck a single blow (Tr. pp. 23, 63-4) with an ordinary penknife used in his work (Tr. p. 239), withdrew without pressing an attack, although deceased remained on his feet and did not appear seriously hurt (Tr. p. 190).

The only record evidence to contradict defendant's claim and testimony that he struck that single blow out of a reasonable fear for his life is the

testimony of two eyewitnesses whose accounts of the altercation conflict in several important respects. Both gave testimony that the deceased did not appear angry and made no threatening gestures toward defendant (Tr. pp. 27-30, 94-6). The first of the prosecution's two eyewitnesses is the deceased's son. The other is an apparently neutral observer not acquainted with either party to the dispute. Yet on the witness stand he manifested great hostility to defendant, describing defendant's conduct at the scene of the altercation as that of an "angry" man from whom he felt a desire to "protect myself" (Tr. pp. 80-94) -- an attitude much more extreme than the deceased's own son expressed (Tr. pp. 27-59). The emotional nature of his testimony is demonstrated by substantial conflicts between his account and those of other witnesses. He insisted he had a "good view" of the altercation (Tr. p. 74) and "never" saw deceased put either hand in his pocket (Tr. p. 98), although deceased's son had already testified that his father had put his right hand in his pocket (Tr. p. 56). This second witness also evinced a clear recollection of seeing the woman involved in the case escort deceased from a grocery store, into which he had walked after being wounded, to his automobile (Tr. pp. 38-9), although the testimony of the woman (Tr. p. 190), the defendant (Tr. p. 221), and the deceased's son (Tr. p. 29) indicates quite clearly that the deceased walked to his car alone.

During cross-examination of deceased's son, the Assistant United States Attorney surrendered to defense counsel a pre-trial statement the witness had given the police (Tr. pp. 31-2). Defense counsel was permitted to use the

statement in cross-examining the witness (Tr. p. 39), but later was foreclosed by a ruling of the Court from introducing the statement in evidence to impeach the witness (Tr. pp. 275-8). The statement was signed by the witness and he acknowledged his signature on the witness stand (Tr. p. 39).

In support of his self-defense plea, defendant produced two witnesses to testify as to his reputation for peaceableness -- his wife and his employer. Both testified that they knew defendant's reputation for peaceableness and that it is good (Tr. pp. 256-7, 267-8). But the Court would not let defense counsel ask either witness whether he or she had ever heard anyone complain about defendant's disposition (Tr. 253-9, 269-270).

In his instructions to the jury, the District Judge, without discussing the size of the knife or the purpose for which defendant carried it, made the following charge: "If, in a prosecution for homicide, it is shown that the accused used a deadly weapon in the commission of the homicide -- and in this case, a knife -- the law infers or presumes from the use of such weapon, in the absence of explanatory or mitigating circumstances, the existence of the malice essential to culpable homicide." (Tr. p. 311). He used this language to instruct the jury despite earlier assurances to defense counsel that he would charge only that "the jury could infer if it chose" (Tr. pp. 272, 275) and refused to supplement or withdraw the charge later when defense counsel took exception to it (Tr. pp. 319-20).

Defense counsel also took exception to the Court's charge on the subjective nature of the issue whether defendant acted in self-defense. The Court

charged: "The use of such force as at the time appears reasonably necessary is justified even though it may afterwards be discovered that the appearances were false and there was in fact neither design to do serious bodily injury or danger that it would be done, nor actual need to use so much force in self-defense." (Tr. p. 315). Because the government's case against the defendant was based on the testimony of witnesses who had no reason to believe the deceased might have been carrying the revolver whose existence was known to the defendant, defense counsel requested, but was denied, a more explicit and detailed charge on this point (Tr. pp. 318-9).

After the jury had been deliberating for nearly an hour, it sent the Court a note requesting "clarification between manslaughter and self-defense." The Court then proposed to counsel that he tell the jury both the difference between second-decree murder and manslaughter and the legal justification that reduces manslaughter to self-defense. When defense counsel reminded the Court that the jury had asked only about the "difference between manslaughter and self-defense" the Court said it would "re-read the whole charge to them on that angle." The new instruction then given repeated the difference between second-decree murder and manslaughter before repeating the same charge given earlier on the matter of self-defense. Only twelve minutes after the jury retired a second time to deliberate, it returned with a verdict that the defendant is guilty of manslaughter.

STATUTES AND RULES INVOLVED

Relevant portions of the Jencks Act, 18 U.S.C. § 3500; the District of

Columbia Code; and the Federal Rules of Criminal Procedure are set forth in Appendix A. to this brief.

STATEMENT OF POINTS

1. A prosecution witness' prior inconsistent statement, produced by the government pursuant to the Jencks Act, 18 U.S.C. § 3500, is admissible in evidence to impeach the witness, and it is prejudicial error for the trial court to limit its use by defense to a mere basis for cross-examining the witness.

2. Testimony of witnesses who have known a homicide defendant and circles in which he has moved that they have heard no adverse comments about his disposition is admissible as reputation or "character" evidence.

3. When the prosecution's only evidence to rebut a plea of self-defense in a homicide case is descriptions of the defendant's behavious by eyewitnesses who could not know of his reason for believing the victim carried a concealed firearm, the trial court has a duty to be especially thorough and explicit in its instruction to the jury that a reasonable relief on defendant's part that he was in imminent danger of death or serious bodily harm would justify his use of deadly force in self-defense, even if it turns out that his belief was not consistent with fact.

4. When the weapon used, in asserted self-defense, to inflict a fatal wound is an ordinary penknife needed and used by the defendant in his employment, it is prejudicial at the ensuing homicide trial for the trial court to

characterize the knife as "a deadly weapon" and to charge the jury that "the law infers or presumes from the use of such weapon, in the absence of explanatory or mitigating circumstances, the existence of the malice essential to culpable homicide."

5. When the jury requests, during deliberation at a second-decree murder trial, clarification of the difference between manslaughter and self-defense, it is prejudicial error for the Court to repeat its earlier instruction on the elements of second-decree murder.

6. In a homicide prosecution the government has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense and does not sustain that burden when it proves only a single blow with an ordinary penknife by a defendant with no history of violence and when its only evidence to rebut the self-defense plea is descriptions of the defendant's behaviour by eye witnesses who could not have known of the victim's earlier threats to the defendant or of the defendant's knowledge that the victim owned a pistol.

SUMMARY OF ARGUMENT

The District Court deprived the defendant of a fair hearing on his plea of self-defense by erroneously exluding two items of evidence offered by the defense and by instructing the jury in a manner prejudicial to the defense.

In refusing to let the defense introduce in evidence, for impeachment purposes, a pre-trial statement taken by the government from a prosecution

witness and signed by him, the District Court ignored clear precedents to the effect that the Jencks Act made no change in the rules of evidence regarding the admissibility and use of a witness' prior statements once they are produced. And decisions predating the Jencks Act expressly permit the admission of such statements in the absence of a claim of privilege, which was not made here, or the applicability of some other exclusionary rule, none of which was cited below. The error is seriously prejudicial, for it prevented a true test of the credibility of one of the two eye witnesses whose testimony was the only basis in the government's case for rebutting the plea of self-defense.

The District Court's refusal to let defense counsel ask character witnesses whether they had ever heard anyone complain about the defendant's disposition violates a common law rule of evidence based on the rationale that, if nothing bad is reported of a person, his reputation must be good.

These two errors in the exclusion of evidence were accompanied by a prejudicial flavor injected into the charge to the jury by the District Court's refusal to give the subjective nature of self-defense the emphasis it deserved in the peculiar context of this trial, the Court's characterization of the defendant's penknife as a "deadly weapon" from use of which "the law infers . . . the existence of malice" and its reemphasis of the second-decree murder charge after the jury had indicated it was choosing between manslaughter and self-defense. In these circumstances the defendant's plea of self-defense could not have received a fair hearing.

These errors aside, all the government's evidence that could possibly be considered as relating to the plea of self-defense is still so weak that any reasonable mind must have a reasonable doubt as to the defendant's guilt. The only evidence that can be considered remotely related to the defendant's state of mind during the altercation is the testimony of the two eye witnesses to the effect that only the defendant and not the deceased appeared angry. Neither of those witnesses, however, had any reason to suspect that the defendant expected the deceased to be carrying a pistol in his pocket. Their conclusion that defendant was exhibiting anger is of highly questionable value and propriety as evidence, and the facts to which they properly testified are as consistent with a feeling of fear on the defendant's part as they are with a feeling of anger.

ARGUMENT

I. The District Court erred in barring the admission in evidence of the pre-trial statement of a government witness.

The production of witnesses' pre-trial statements in the possession of the government did not begin with Jencks v. United States, 353 U.S. 657 (1957). In Gordon v. United States, 344 U.S. 414 (1953), the Supreme Court found "Highly respectable authority in state and lower federal courts in support of the view that an accused is entitled to the production of such documents." (344 U.S. at 419.) The issue in that case was whether the defense was entitled to the production of a pre-trial statement and to its admission in

evidence to impeach the witness once the witness himself had admitted, on cross-examination, that the earlier statement contradicted his testimony. Answering that question in the affirmative, the Supreme Court declared: "an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence, providing it meets all other requirements of admissibility and no valid claim of privilege is raised against it. The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the document's impeaching weight and significance." (344 U.S. at 420-421.)

In the Jencks case, too, the Supreme Court spoke of the right of the defense to production of pre-trial statements "for the accused's inspection and for admission in evidence.." (353 U.S. at 672.)

The Jencks Act itself contains no language that can be construed as precluding the admission of such a pre-trial statement in evidence to impeach the witness. The statute merely spells out the conditions under which such statements are to be delivered "to the defendant for his examination and use." "The statute . . . does not purport to affect or modify the rules of evidence

regarding admissibility and use of statements once produced." Palermo v. United States, 360 U.S. 343 (1959). See also United States v. Knox Coal Co., 347 F.2d 33 (3d Cir. 1965), cert. denied, 382 U.S. 904.

In the present case, the government made no claim of privilege for the document and cited no reason in the law of evidence for excluding it. The statement in question was signed by the witness; he acknowledged his signature on the witness stand; and there is nothing to indicate that his pre-trial statement was not just as admissible in evidence as was the pre-trial statement in the Gordon case quoted above. Apparently both the government and the District Court were of the erroneous view that the Jencks Act limits the use of these pre-trial statements to cross-examination--a proposition clearly rejected in Palermo.

Since the witness who made the pre-trial statement was one of the two whose testimony represented the only attempt by the government to rebut the plea of self-defense, obviously an attack on the credibility of his testimony was of utmost importance to the defense. Therefore, the Court's erroneous refusal to admit the statement in evidence was highly prejudicial to the defendant. By reason of the Court's error, the jury was prevented from making a fair evaluation of the testimony of this key witness for the prosecution.

II. The District Court improperly limited defense counsel's questioning of character witnesses.

This Court recognized in Shimon v. United States, 122 U.S. App. D.C.

152, 352 F.2d 449 (D.C. 1965), that the applicable rule of evidence is given in Michelson v. United States, 335 U.S. 469 (1948). In the Michelson case, the Supreme Court explicitly recognized that a character witness can testify "that he has 'heard nothing against defendant.' This is permitted upon the assumption that, if no ill is reported of one, his reputation must be good." (335 U.S. at 478.)

The Supreme Court went on to say that this sort of testimony "is accepted only from a witness whose knowledge of defendant's habitat and surroundings is intimate enough so that his failure to hear of any relevant ill repute is an assurance that no ugly rumors were about." This requirement of familiarity with the defendant and his habitat are clearly satisfied in the present case, for the character witnesses were his wife and the man who had been his employer for two years. Defense counsel's question was phrased in the proper "have you ever heard?" terms (Tr. p. 255). The error in the District Court's insistence that defense counsel follow a questioning routine that first establishes that the character witnesses have discussed the defendant's reputation with others was perhaps best expressed by defense counsel at the trial when he said: "I don't think any businessman in 1967 says to his employees, what is Abraham Williams' reputation?" (Tr. p. 269).

The erroneous restriction of defense counsel's questioning of character witnesses was particularly prejudicial to the defense in its application to questioning of defendant's employer. On cross-examination, the Assistant

United States Attorney made a point of establishing that the employer had never had occasion to talk to his other employees about the defendant's reputation for peace and good order (Tr. pp. 267-3.) Actually, the employer's "no" answer to the Assistant United States Attorney's question, "Has there been any occasion for it [defendant's reputation] to come up?" should, under the rule of evidence set out in the Michelson opinion, have served as evidence in the defendant's favor. In the context of the District Court's ruling as to what constitutes admissible character evidence, however, the employer's answer tended to convince the jury that the defendant did not have evidence of good character.

That an erroneous ruling effectively wiping out the defendant's character evidence is prejudicial error would hardly seem disputable, since the Supreme Court held in Edgington v. United States, 164 U.S. 361 (1896) that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt. When the only defense attempted against a criminal charge is self-defense, character evidence is particularly important, for in a sense it is defendant's state of mind that is in issue.

III. The District Court erred in denying defense counsel's request for more explicit instructions to the jury on the effect of false appearances upon the validity of a self-defense plea.

As this Court pointed out in Josey v. United States, 77 U.S. App. D.C. 321, 135 F.2d 309 (1943), "one of the determining elements in self-defense

is the belief of the accused, concerning the imminence of danger." And "it is the apparent and not the real or actual necessity of taking another's life to protect oneself from death or great bodily harm at the hands of a person killed which controls the determination of the question whether the killing was justifiable or excusable as having been done in self-defense." 12 Am. Jur. Homicide § 133 (1963). Moreover, "a belief which may be unreasonable in cold blood may be actually and reasonably entertained in the heat of passion." Inge v. United States, 123 U. S. App. D. C. 6, 356 F. 2d 345 (1966).

In the present case, it was, as a practical matter, incumbent upon the defendant to convince the jury that he acted out of fear engendered by his knowledge that the deceased owned a revolver and by his belief that the revolver was in deceased's pocket and that deceased intended to use it. This was the heart of the defense at the trial, but the jury could not have given it that much importance in light of the brief instruction given by the District Court: "The use of such force as at the time appears reasonably necessary is justified even though it may afterwards be discovered that the appearances were false and there was in fact neither design to do serious bodily injury or danger that it would be done, nor actual need to use so much force in self-defense." (Tr. p. 315.)

So many of the circumstances of this case--the nature of the weapon used by defendant, his restriction of his use of violence to a single blow, and his immediate withdrawal after striking that blow--are consistent with a mis-

taken belief on defendant's part that the deceased was armed that the District Court was obligated to give more detailed instructions to make sure the jury gave proper weight to those circumstances.

IV. The District Court's jury instructions overstated the significance of the defendant's possession and use of a penknife.

Never once in his instructions did the District Court make any reference to the uncontroverted testimony of the defendant that the weapon with which the fatal blow was struck was an ordinary penknife that he carried because he needed it in his work as a delivery-truck driver (Tr. p. 239). Instead, the District Court impressed on the jury's mind that the knife is a "deadly weapon" from the use of which "the law infers or presumes" the existence of an evil intent. It is true the District Court told the jury that the law infers this evil intent only "in the absence of explanatory or mitigating circumstances." But he did not suggest any circumstances in this case that the jury might take into consideration. He gave only the elements from which the jury could infer guilt, not elements from which it could infer innocence.

"A charge to a jury should be drawn with reference to the particular facts of the case on trial." Collazo v. United States, 90 U.S. App. D.C. 241, 196 F. 2d 573, 578 (1952). Under that standard, the District Court was obligated to instruct the jurors that they could infer from the nature, size, and normal intended use of the penknife, that it was not such a "deadly" instrument that defendant's possession and use of it in any way negatives his claim

that he acted in self-defense. In fact, the Court might well have given the instruction approved by this Court in the Collazo case: "If a man uses upon another an instrument of such a nature and in such a way as to result naturally and probably in death, the jury might infer--but 'is not compelled to presume' --that he intended to kill." 196 F. 2d at 578. However, instead of letting the jury determine whether the penknife should be considered a "deadly weapon" from which an inference of "the malice essential to culpable homicide" can be drawn, the District Court made the determination for the jury. The jury was told, unequivocally, that the penknife is a "deadly weapon" and that from its use "the law infers or presumes" the evil intent.

"No rational inference of criminal intent can be drawn from the mere possession of tools which 'reasonably may be employed' in crime. Such a definition encompasses a wide variety of implements, possession of which does not in itself give rise to sinister implications." Benton v. United States, 98 U.S. App. D.C. 34, 232 F. 2d 341, 344-5 (1956).

True, this portion of the District Court's charge to the jury was given in explaining proof of malice as an element of second-decree murder, of which the jury acquitted defendant. Nevertheless, the instruction could not have helped but influence the jury in its deliberations as to whether it should convict the defendant of homicide or acquit him of that lesser included offense as well. Not only the description of the penknife as a "deadly weapon" was likely to carry over into their deliberations on their manslaughter verdict but

also the Court's reference to "the existence of the malice essential to culpable homicide," which could reasonably be interpreted as applicable to manslaughter as well as second-decree murder.

V. The District Court erred in repeating its instructions on second-decree murder upon the jury's request for clarification of the difference between manslaughter and self-defense.

"Precisely because it was a 'last-minute instruction' the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were 'hopelessly deadlocked' after they had been out seven hours. 'In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the prupose of assuring its proper conduct and of determining questions of law.' Quercia v. United States, 289 U.S. 466, 469. 'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr v. United States, 153 U.S. 614, 626, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge . . . When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Bollenbach v. United States, 326 U.S. 607, 612-3 (1946).

"It is no answer to say that the supplemental instruction was correct, so far as it went; or that it was to be read in the light of the original instructions

and that these fairly presented the issues. The ultimate question is 'whether the charge taken as a whole was such as to confuse or leave an erroneous impression in the minds of the jurors.' Perez v. United States, 297 F. 2d 12, 16 (5th Cir. 1961)." Powell v. United States, 347 F. 2d 156 (9th Cir. 1965).

Here the District Court seemed determined to make sure the final impression the jury took back with it would include a reminder of the second degree murder charge. Since the jurors had obviously decided to acquite the defendant of that charge, it represented no part of the circumstances relevant to their decision whether the defendant had acted in self-defense or was guilty of manslaughter. It was therefore prejudicial error for the District Court gratuitously to reinsert that irrelevant element into their thoughts.

VI. The combined effect of the District Court's errors in the two items of evidence and in its instructions was prejudicial, for defendant was denied his plea of self-defense.

The whole theory of the defense at the trial of this case was that the defendant is a peaceable man who in a moment of extreme stress struck a single moderate blow to ward off a larger and stronger man reasonably seen, through the defendant's eyes, as acting aggressively and with a purpose of using a concealed firearm. As a result of the District Court's actions described above, however, the defense was deprived of the heart of its character evidence on peaceableness and prevented from effectively impeaching the government's evidence rebutting self-defense; the jury was told that the

defendant was the possessor and user of a "deadly weapon," from which the law infers murderous intent; and the final impression left with the jury, after it had obviously decided to acquit of second-decree murder, was a reminder that the government considered the defendant's behaviour severe enough to justify a murder charge. Put together, these aspects of the trial make it extremely unlikely that the jury ever really gave thought to the true issue they still had to resolve when they asked for "clarification of the difference between manslaughter and self-defense." It hardly seems possible in these circumstances that they were then inclined, or thought they were expected, to look at the facts given them to see if those facts furnished a reasonable basis for a belief by the defendant that he was in imminent danger of death or serious bodily harm.

VII. The government did not sustain its burden of proving beyond a reasonable doubt that defendant did not act in self-defense.

The District Court correctly instructed the jury that, "if as a result of all the evidence or lack of evidence a reasonable doubt has been engendered in your minds as to whether the defendant acted in self-defense, that doubt must be resolved in favor of the defendant for the burden is on the government to establish that he did not act in self-defense." And admittedly the criterion to be met on appeal before the evidence can be held insufficient to support the verdict is an exacting one. The jury's verdict must stand unless "there must be [a reasonable] doubt in a reasonable mind." Curley v. United States, 31 U.S. App. D.C. 389, 160 F.2d 229, 232 (1947).

In the present case, however, the important point is that almost all the self-defense evidence introduced by the defense is uncontradicted. None of the evidence introduced to show the reason for defendant's fear was disputed. Only the actual existence of fear and reasonable grounds for it, at the time of the altercation between the defendant and the deceased was placed in issue by the government's case. Obviously the only witness at the trial who actually knew the defendant's state of mind was the defendant himself. The government's two eye witnesses could properly testify only as to the visible signs or manifestations of the workings of the defendant's mind. Those witnesses testified only that the deceased made no gestures that appeared dangerous to them and that it was the defendant who "yelled" (Tr. pp. 41, 37) and appeared "angry" (Tr. p. 79). But gestures can be interpreted as harmless by a bystander or by a friend or relative of the individual making them and yet quite reasonably instill fear in the person to whom they are directed, particularly when that person has reason to consider the gesturer an adversary and to believe that he is armed. A raised voice is as consistent with fear as with anger. And testimony that the defendant was "angry" was a conclusion of the witness, not a statement of what he saw. He was interpreting the defendant's conduct -- even, in a sense, reading the defendant's mind. A man in fear for his life and determined not to lose it passively is quite likely to react in anger. Moreover, the emotions of an individual with whom one is not familiar are not easy to interpret accurately. Consequently, the interpretation the government's key witness placed on the defendant's demeanor at the scene of the altercation is

worthless.

Finally, there are important and undisputed aspects of the defendant's conduct that confirm his plea of self-defense. If it had been he who was angry and aggressive, it seems quite unlikely that the episode would have ended with the single blow he struck. The undisputed fact that he walked away from the deceased as soon as the blow was struck and made no effort to press any attack on his still upright and advancing adversary (Tr. pp. 29, 65) clearly demonstrate that he had no deadly purpose. His withdrawal and his words in response to seeing that the deceased had again followed him (Tr. p. 65) show that his only purpose was to defend himself. He refrained from any further violence as soon as it appeared the deceased was not going to use his revolver.

CONCLUSION

Because the evidence does not support the verdict, the defendant's conviction should be set aside and the District Court directed to enter judgment of acquittal. In the alternative, the District Court's errors in the conduct of the trial require that the conviction be set aside and this cause remanded for a new trial.

Respectfully submitted,

John C. Scott
Attorney for Appellant
1730 Rhode Island Avenue, N.W.
Washington, D.C., 20036

(Appointed by this Court)

Dated: May 28, 1968

APPENDIX A

STATUTES AND RULES INVOLVED

Statutory Provisions Involved

Section 3500 of Title 18 of the United States Code (Jencks Act) provides:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prspective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the even the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means-

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Section 22-2403 of the District of Columbia Code provides:

"Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree."

Rules Involved

Rule 26 of the Federal Rules of Criminal Procedure provides:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Rule 33 of the Federal Rules of Criminal Procedure provides:

"The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,362

ABRAHAM WILLIAMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney

FRANK Q. NEBEKER,
WILLIAM L. DAVIS,
J. JAMES MCKENNA,
Assistant United States Attorneys

Cr. No. 992-66

ISSUES PRESENTED

In the opinion of appellee, the following issues are presented:

(1) When the record is clear that one Government witness had given a written statement to the police, and that such statement was immediately given to trial counsel at the very outset of cross-examination, and that trial counsel used such statement extensively against the witness for impeachment purposes, can appellant now say that some prejudice arose against him merely because the statement was not allowed to go into the jury room during deliberations?

(2) When the record is clear that appellant was allowed to freely put on evidence of his good character through the testimony of his wife and his employer, can appellant now claim error when it is equally clear that trial counsel refused, despite numerous warnings and hints and explanations by the trial court, to couch his questions in a proper fashion?

(3) When the instructions of the trial court are meticulously and carefully given to the jury, covering all of the general and specific points of law raised by the evidence in the cases, can appellant now claim error:

(a) In the giving of the standard instruction on self-defense covering the aspect of the "reasonable belief" of danger on appellant's part, simply because appellant feels that the court failed to emphasize such instruction enough for his defense purposes?

(b) In the charge that in a prosecution for homicide the law infers or presumes malice from the carrying of a deadly weapon, in this case a knife, which weapon is used in the commission of the homicide, *in the absence of explanatory or mitigating circumstances*, especially in light of the indisputable facts that this same knife did kill the deceased, and that appellant had ample opportunity to explain his carrying of this weapon?

(c) In the further instruction, given at the request of the jury after some period of deliberation, as to the difference between manslaughter and self-defense, especially since there was no objection below?

(4) When the Government's case in chief reflects the testimony of two eyewitnesses, one of whom admittedly was a stranger to both appellant and decedent, and this testimony is corroborated in great detail by the testimony of appellant himself, can such a clear question of credibility now be characterized by appellant as a failure of proof on the part of the prosecution?

INDEX

TABLE OF CASES

OTHER REFERENCES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,362

ABRAHAM WILLIAMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged by indictment with second degree murder, and found guilty of the lesser offense of manslaughter, after a two day trial on July 24 and 25, 1967. On October 6, 1967, he was sentenced to imprisonment for a period of two to six years. This appeal followed.

The Government called four witnesses: William Brownlee, Deputy Coroner for the District of Columbia; Alvin Edwards, the son of the deceased Wilbur Edwards, and an eyewitness to the stabbing which resulted in Edwards'

death; Robert Louis Robinson, another eyewitness to the stabbing; and finally, Leo Edward Spencer, a detective with the Metropolitan Police Force. There never was any disagreement as to the fact of the stabbing of the deceased or as to the further fact that appellant was the one who did the stabbing. The deceased had been going with a certain lady named Ola Brown, prior to the date of the stabbing on June 28, 1966. This liaison had lasted over a period of some two years. (Tr. 32, 179.) However, during the month of either May or June 1966, deceased and Mrs. Brown began ". . . to have . . . difficulties" (Tr. 183).

According to appellant, it was sometime during this same period that he met deceased for the first and only time prior to the night of the stabbing, and it was also during this immediate period that he met Ola Brown (Tr. 206, 208). Appellant's only meeting with deceased, prior to June 28, 1966, was on an evening when he went to Ola Brown's house (Tr. 209). Appellant described his initial confrontation with deceased as apparently peaceful, (Tr. 209-10) but then went on to recount an alleged threat by deceased when he announced that he was going to leave (Tr. 210-11). Although appellant claimed that deceased threatened to shoot him, he never did see a gun in deceased's hand. The closest thing to any mention of a gun was that deceased had his hand in his pocket (Tr. 211).

On the night of the 28th of June, the deceased was in the company of his two sons when he drove to Ola Brown's house, to get a hose he had left there (Tr. 25-26, 34). Appellant was in the vicinity of her house at this time, but there is no indication that there was any communication between him and deceased at that location.

Deceased and Mrs. Brown had a brief conversation, during which Mrs. Brown declined to go to the "A&P" in deceased's car. There was no indication that this declination bothered deceased (Tr. 37).

Deceased then drove away from the scene to get some gas (Tr. 26) and subsequently saw Mrs. Brown near the

store. Having parked the car, deceased got out, and appellant was seen in the vicinity (Tr. 26-27). Deceased's son at first testified that he did not hear any mention of Ola Brown at this point in time (Tr. 38), but having been shown a written statement he had given to the police, he clarified this point and testified that he had in fact heard his father mention Ola Brown to appellant when he got out of the car (Tr. 30-41). (This statement was readily proffered to appellant's counsel by the prosecutor at the outset of the cross examination) (Tr. 31).

Having engaged in conversation for a time, appellant reached into his pocket and pulled out a knife, striking deceased in the chest (Tr. 28, 63-64, 219). No one, including appellant, ever saw anything in either of deceased's hands at the time of the stabbing.

Having struck deceased with a knife, appellant turned away and walked into the A&P, with deceased following. There were some slight discrepancies in the testimony as to just what deceased did while in the store, with the Government witnesses describing him as having been bent over, while the defense witnesses said that he stood upright the whole time (Tr. 65, 191, 220-21), but all agreed that he subsequently walked outside and got into his car and drove away.

He only drove a short distance when he had a conversation with his son in which he told him there was a gun under the front seat, and instructed him to get it and throw it out the window of the car (Tr. 46). Shortly after this the car went out of control and crashed, coming to rest against a tree (Tr. 46). Deceased was dead on arrival at the hospital (Tr. 11).

The defense called two character witnesses. However, problems arose a number of times as to the manner in which appellant's trial counsel was framing the questions, to the point that the trial judge made an on the record offer to meet with counsel in his chambers and explain the procedure with regard to examining character witnesses (Tr. 260). The two witnesses were appellant's wife and his employer.

STATUTE INVOLVED

Title 18, United States Code, Section 3500, provides:

Demands For Production Of Statements And Reports Of Witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by

the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement" as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

SUMMARY OF ARGUMENT

I

Throughout the course of the judicial and legislative history surrounding the so-called "Jencks Act" it has been clarion that the purpose of having the prosecution produce prior written statements of witnesses called by the prosecution, under certain circumstances, has been to allow the defense an opportunity to impeach the testimony of such witness on cross-examination. In this case, there was

such a statement produced by the prosecution, and the statement was used, at great length by appellant's trial counsel. With such a background, appellant should not be allowed to claim reversible error simply because the mere written statement itself was not allowed into the jury room when the jury retired for deliberation.

II

There were two character witnesses called by appellant. These people were his wife and his employer. Time and time again appellant's trial counsel attempted to elicit from both of these individuals information which was improperly couched in the proper language for character testimony, and time and time again the trial court spelled out the correct manner in which such questions should be asked. Despite these corrective methods adopted by the trial court, and despite the fact that the trial court even went so far as to invite trial counsel into his chambers in order that he might explain the proper method of approach on character testimony, trial counsel persisted in asking improper questions. Since the record is clear that the full character testimony got before the jury, and since any problem which arose along this line was caused by the absolute obstinacy of trial counsel, appellant should not now be allowed to claim reversible error.

III

There was no error whatever in the charge given by the trial court. The court gave the standard instruction on self-defense and also gave an instruction which covered the situation in which appearances in appellant's eyes later turned out to be false. Thus, for appellant to now claim error based upon an instruction which was in fact given, on the basis that sufficient emphasis was not placed on it by the court, is a fruitless semantical exercise.

Another objection is made to the charge based upon the characterization of the murder weapon as a "deadly weapon." This argument fails to take cognizance of the fact

that the weapon used by appellant did, in fact, kill the decedent. The point as to whether or not such a knife can fairly be described as a "deadly weapon" seems rather moot in the face of the stark reality of the dead man. Since the law does infer malice from the use of such weapon, in the absence of exploratory or mitigating circumstances, the court obviously was correct in this portion of its charge. Appellant took the stand and attempted to explain his reasons for using the knife on decedent. Obviously, the jury, in finding him guilty of the lesser included offense of manslaughter, paid heed to the court's instruction, and chose to ignore appellant's claim of self-defense.

Finally, appellant claims error in the instruction as given to the jury after they indicated they had a question. The precise question was: "The jury would like a clarification between manslaughter and self defense" (Tr. 341-42). The record reflects (Tr. 341) that the court proposed to reread the whole charge to them ". . . on that angle", and appellant's trial counsel acquiesced in this. That portion of the charge dealing with manslaughter and self-defense was thereupon given to the jury, with no indication of any objection by appellant. This supposed issue raised by appellant is nothing more than one of simple fact, which is settled in appellee's favor by merely reading the record.

IV

The question raised by appellant as to the totality of the Government's case fails merely by digesting the facts as represented in the record. There is no better way to rebut appellant's claim of self-defense than to call to the stand two eyewitnesses to the event. Admittedly, one of the eyewitnesses was the son of the deceased, but the other man was a newspaper reporter, a stranger to both appellant and deceased, who merely happened to be in the area at the time of the stabbing. Appellant would dismiss the testimony of this individual precisely for the same reason

that his testimony is so valuable. Appellant avers, of necessity, that because this eyewitness was an objective, dispassionate stranger to him, he could not have known what was going on in his mind at the moment when he stabbed deceased. However, this position fails to take into account that the witness, of all the people called by either side, was the only one who had no possible interest in the outcome of the case, and for this reason was the only one whose testimony was unlikely to be colored in favor of one side or the other.

All that appellant brings out by raising this spurious issue is that the question of self-defense was one which had to be judged on the basis of credibility, which the trier of fact found against appellant.

ARGUMENT

I. There was no error in the court's failure to allow the written statement of one Government witness to be taken into the jury room.

(Tr. 31-59)

Mr. Justice Frankfurter, in *Palermo* v. *United States*, 360 U.S. 343 (1959), discusses the "Jencks Act" [1] in great detail. One message which comes through his opinion in a loud and clear fashion is that "Jencks" statements, once they are determined to be allowed to the defense, are so allowed for *impeachment* purposes only. Justice Frankfurter says: ". . . (Subsection (a) of the Jencks Act) manifests the general statutory aim to *restrict* the use of such statements to impeachment." *Palermo*, *supra*, at 349. (Emphasis added.)

One need read nothing more than *Jencks* v. *United States*, 353 U.S. 657 (1957), the act itself, *supra*, and the *Palermo* case, *supra*, in order to see just what "Jencks" statements are meant to represent to the defense in a criminal case. They are to be provided, under certain circumstances, for the purpose of *impeachment*.

---

[1] Title 18, Section 3500, United States Code.

In the instant case, defense counsel was provided with just such a statement at the very beginning of cross-examination of a Government eyewitness. In fact, counsel did not have to ask for the statement, but rather the prosecutor asked to approach the bench at which time the statement was given over to him. (Tr. 31.)

Having once obtained the document, defense counsel made good use of it. On no less than three occasions, during the course of a detailed cross-examination which covered twenty-eight pages of transcript, defense counsel made reference to this written statement, in an effort to impeach the witness. (Tr. 31-59) Obviously, there can be no claim now that defense counsel failed to cover any important discrepancy which might have been contained in the statement. In this context, appellant should not now be allowed to claim error with reference to this statement, since any impeachment value it may have had was exhausted during cross-examination. ". . . Reversals should not be based on trivial, theoretical and harmless rulings. . . ." *Gordon* v. *United States*, 344 U.S. 414 (1953) at 423.

II. There was no error committed when the trial court simply required trial counsel to observe proper form in asking questions of character witnesses.

(Tr. 254, 256, 259, 260, 264-67, 270)

At the very outset of the direct testimony of appellant's wife, counsel announced that he intended to put character evidence into the case (Tr. 254). At this same bench conference (Tr. 255) the court correctly informed counsel to "Put in reputation for truthful and peaceful character but limit it to reputation." Trial counsel agreed to this. However, from that point on, counsel repeatedly attempted to ask this witness questions which either called for a recounting of a specific instance of a good act on appellant's part, or which concerned the witness' *own* opinion of appellant's character. In each instance, counsel was stopped from asking the particular question as phrased,

but in each instance counsel was allowed to continue direct examination.

In fact, at the very beginning of the wife's testimony, the court itself took over part of the direct examination in an effort to arrive at some proper testimony as to appellant's character (Tr. 256). The court went all the way through with the direct examination and did elicit proper character testimony. However, at the end of this examination, counsel indicated that he had a few more questions to ask, and had to be stopped again, the culmination of which was in the noting of his objection (Tr. 259). It is at this point in the record that the court invited defense counsel into his chambers to show him the proper way to handle character testimony (Tr. 260). The record is silent as to whether counsel ever took the court up on this proposal.

The second character witness started off his testimony without any problem, and was freely allowed to testify that appellant had an "excellent" relationship with his fellow employees, an "excellent" reputation for peace and good order in the community, and an "excellent" reputation for honesty and veracity, and that his reputation for these things was just as excellent at that time as it had been at the time of the stabbing. This direct testimony was had without interruption or objection by either the court or the prosecutor. (Tr. 264-267.)

The prosecutor asked a total of five questions on cross-examination, the gist of which was to explore whether the witness had ever actually discussed appellant's reputation, and he received a negative reply. However, on redirect, the witness was allowed to define what he meant by peace and good order, and was also allowed to testify that appellant dealt with a great number of customers each day. It was only when counsel attempted to ask about specific instances that he ran into further difficulty, and he thereupon noted another objection (Tr. 270).

Since the law is quite clear that ". . . evidence of good or bad character is restricted to general reputation, and does not extend to particulars. . ." (*Josey* v. *United*

States, 77 U.S. App. D.C. 321, 323, 135 F.2d 809, 811 (1943)), the court was correct in its mild limitation of defense counsel. In any event, the record further reflects that both of the purported character witnesses did, in fact, testify fully on the subject of appellant's character, which in and of itself moots the possibility of error.

III. There is no error in the instructions to the jury, either in the instruction as first given, or in the instruction given after the jury indicated it required further advice.

(Tr. 231, 243-44, 341, 347)

Appellant has found fault with the jury charge in three separate aspects, and has made three separate issues of them. However, appellee shall treat all three of the latter as one issue based on the charge in general.

Appellant first finds fault with the court's charge on self-defense. However, this point is not very well taken by appellant since the record reflects that the instruction as given is almost identical to that requested by trial counsel. Putting this fact aside for the moment, it is apparent from the record that appellant is assuming a great number of things which simply do not appear anywhere in the recorded transcript. An example of this unsupported type of argument is when appellant states that deceased was a much larger man than himself. The instances cited by appellant (i.e., Tr. pp. 6 and 73) give a very good description of deceased's size, but nowhere in the record is there any indication as to just how large a man appellant is. The only exception to this appears at page 246, where appellant's redirect testimony indicates simply that deceased was taller than he.

A second example of unsupported argument made by appellant is when he makes the flat statement that he knew deceased owned a gun. This is simply *not* supported by the record. In fact, quite the contrary is indicated. The record is clear that on the only two occasions appellant ever met deceased, he did *not* see a gun (Tr. 231,

244). Thus, in its necessary consideration of appellant's plea of self-defense, the jury knew the facts as contained in the record, and not the facts as purported by appellant in his brief.

Appellant is quite correct on the law when he cites the language ". . . a belief which may be unreasonable in cold blood may be actually and reasonably entertained in the heat of passion." *Inge* v. *United States*, 123 U.S. App. D.C. 6, 9, 356 F.2d 345, 348 (1966). However, appellant is assuming that there was sufficient "heat of passion" in the instant case to make an argument on this score. The record does not reflect that such is the case. Taking appellant's case at its very best, there does not appear to be any heated confrontation between himself and deceased just prior to his stabbing of appellant. At best there is an invitation by deceased to appellant to accompany him over to his automobile, where, according to appellant, deceased threatened to kill him. It is significant that, aside from the fact that appellant claims deceased had his hand in his left pocket, there is no claim made by appellant that deceased said anything about shooting him in order to kill him.

Necessarily tied in with this aspect of the court's instruction is the second question presented by appellant as to the use of the phrase "deadly weapon" when referring to the murder weapon, and the fact that the law presumes malice from the use of such a weapon, in the absence of explanation or mitigation. Appellant made an attempt to show on the record that he carried this knife as a necessary incident to his work. However, his use of the knife at the time of the stabbing indicated that his familiarity with its use was far greater than merely cutting string on the job.

The record shows that, in what would appear to be one continuous motion, appellant reached into his pocket, grabbed his knife which was closed at the instant, "drug" it across his body in such a way as to put the blade into a fully open position, and then proceeded to plunge it into deceased's chest (Tr. 243-44). When one links all the

above facts together, it is rather evident that the jury had ample reason to elect to ignore appellant's claim of self defense, and a reading of the record, as noted above, clearly shows that the trial court was extremely accurate in its instruction in this regard. Obviously, there was no special need presented by the evidence constraining the court to especially emphasize the relevant instruction, which is what appellant now claims the court should have done.

Appellant's last argument as to the instruction pertains to the response made by the court to the jury's request for a clarification between manslaughter and self-defense. However, appellee feels that this is a rather spurious argument under the circumstances of this case. In effect, appellant is criticizing the court for being overly meticulous. In fact, appellant's trial counsel, who is reflected in the record as extremely aggressive and particularly jealous of every right belonging to appellant, made no objection to the further instruction proposed by the court at this point, either at the time when the court proposed what instruction he was going to give (Tr. 341) or at the end of the additional instruction (Tr. 347).

In the absence of any objection below, this court must find "plain error" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure, and this additional instruction cannot constitute such.

IV. The Government's case in chief was overwhelming as to appellant's guilt, and even taking appellant's version in its best light, the record fails to support a valid claim of self defense.

(Tr. 219, 245, 248)

Appellant seeks to discredit the testimony of the eyewitnesses. However, even if we were to absent their testimony, and look solely at appellant's own case, it is obvious that his claim of self-defense is weak at best. He attempts first to claim that he was afraid for his life because deceased was such a larger and heavier man. This claim is not supported anywhere in the record, and, other

than the notation that deceased was taller than appellant as noted above, there does not appear in the record any effort on the part of trial counsel to make a comparison between the two men. This simply does not appear to have been an issue which concerned trial counsel.

Next, appellant makes the claim that he was in mortal fear of his life because he knew deceased had a gun. Once again, the record does not support this position, but rather tends to negate it since it is clear that appellant never saw deceased with a gun. In fact, it would seem more logical that since deceased allegedly threatened appellant on an earlier occasion and placed his hand in his pocket, without producing a gun, appellant would be a little more skeptical on the second occasion when deceased went through the same routine. Appellant himself did not claim that the circumstances surrounding his confrontation with deceased at the time of the stabbing were passionate or even boisterous. He merely recited that deceased had threatened to kill him and for some reason wanted to get him over to his car.

The only action that appellant claimed was done by deceased was that deceased put his hand on his shoulder, at one point in his testimony, and on another occasion stated that deceased grabbed his arm, "with force" (Tr. 219, 248). Appellant never claimed that deceased indicated by word of mouth he was carrying a gun. In fact, appellant characterized deceased as only ". . . a little bit angry but not too much" (Tr. 245) at a period of time just prior to the stabbing. This confrontation, according to appellant, was had inside the A&P store, and during the course of it deceased asked appellant to step outside, which he did.

This is the case as it appeared solely from the viewpoint of appellant. Clearly, there is no strong showing of self defense. Then, when the Government's evidence is considered, and the fact is considered that one of the Government eyewitnesses was a total stranger to both parties, and the further fact is considered that this witness clear-

ly indicates that just prior to the lunging and stabbing by appellant there was nothing more than an argument going on, with no outward aggression indicated on the part of deceased, the Government's evidence against appellant is monumental.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM L. DAVIS,
J. JAMES MCKENNA,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 315165 73

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT of APPEALS
for the DISTRICT of COLUMBIA CIRCUIT

No. 21, 362

ABRAHAM WILLIAMS, Appellant

v.

UNITED STATES of AMERICA, Appellee

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOHN C. SCOTT
1730 Rhode Island Avenue N.W.
Washington, D. C. 20036
Attorney for Appellant
(Appointed by this Court)

August 9, 1968

INDEX

UNITED STATES COURT of APPEALS
for the DISTRICT of COLUMBIA CIRCUIT

No. 21,362

ABRAHAM WILLIAMS, Appellant

v.

UNITED STATES of AMERICA, Appellee

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

I. The District Court's Trial Errors Should Be Considered in the Aggregate in Determining Whether Reversible Error Occurred

The government's brief segregates each of the points raised by the defendant and examines them individually for prejudicial effect. No attempt is made to meet the defendant's contention that reversible error lies in the over-all effect of all the trial court's incorrect rulings upon the presentation of the defendant's case of self-defense and upon the jury's consideration of that defense.

"Although one of several incidents or errors, standing alone, may be disregarded as harmless error, it is still possible that when considered in toto they accumulate such a cumulative prejudice that they may require a reversal. Thus, if the record shows a number of minor errors, and their cumulative effect is such that without them there might have been a different verdict, although individually harmless error, they become jointly reversible error. This is especially true where the appellate court feels that the trial court's rulings in a number of comparatively minor matters have been such as to convey to the jury that the court is prejudiced in that matter, or where the general conduct of the trial is such that the appellate court cannot be confident that a fair verdict has been returned. In this regard it should be kept in mind that while a single error may, of itself, be harmless, it may still be important as showing a prejudicial trend in the trial of a case that will result in prejudicial and reversible error." 5 A.Jur. Appeal and Error §789 (1962)

II. The Government's Argument on the Use to Be Made of the "Jencks" Statement Misses the Point

Part I of the argument in the government's brief repeatedly stresses that "Jencks" statements are produced "for impeachment purposes only" - as if defendant sought at the trial in the present case to use the statement at issue for some additional purpose. Defendant concedes that use of the statement is so limited; the issue here is whether the defense is to be allowed the full impeaching value of the statement.

It was trial counsel's judgment that the full impeaching value of the prosecution witness' statement could be realized only if the jury were permitted to see that statement itself. Set forth in its brief is the government's judgment that "any impeachment value it may have had was exhausted during cross-examination." The government is overlooking a key element in the rationale of the Jencks case - that "only the

defense is adequately equipped to determine the effective use for purpose of discrediting the government's witness and thereby furthering the accused's defense." 353 U.S. at 668-9.

III. Defendant's Self-Defense Argument that He Is a Smaller Man than Deceased Has Support in the Evidence

Part III of the government's brief asserts that the defendant's brief makes an "unsupported" argument in stating that deceased was a larger man than the defendant. The point made is that the recorded transcript, while it describes the deceased as a man six feet, one inch in height and 189 pounds in weight (Tr. 6), does not give "any indication as to just how large a man appellant is."

But the defendant was present in the courtroom for the jury to see, and the record does show (Tr. 204) that the defendant took the stand in plain view of the jury to testify in his own behalf. Surely the government is not suggesting that the appearance, including the size, of a witness - especially the defendant - is not evidence juries do and should see and consider. The defendant is entitled to assume that his physical appearance on the stand was evidence in the case, even if it cannot be reflected in the transcript. He can also assume that the difference between his five feet, eleven inches, 160 pounds and the dimensions given in the government witness' description of the deceased was apparent to the jurors.

IV. Conclusion

When considered together, the five trial errors pointed out by the defendant can in no sense of the words be considered "trivial, theoretical and harmless"

within the meaning of Gordon v. United States, 344 U.S. 414, 423 (1953).

Respectfully submitted,

John C. Scott
Attorney for Appellant
1730 Rhode Island Avenue N.W.
Washington, D. C. 20036
(Appointed by this Court)

Dated: August 9, 1968

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21362

Abraham Williams, Appellant

v.

United States of America, Appellee

PETITION FOR RE-HEARING

To the Honorable Judges of the United States Court of Appeals
for the District of Columbia Circuit:

Abraham Williams, the defendant-appellant above-named, respectfully prays the Court to grant a re-hearing in this case. The basis for the request is the erroneous attribution in the opinion of the Court of a certain statement to appellant rather than the deceased. This miscon-

ception appears in the Court's opinion on page 3 when it says:

> Appellant said to Edwards, "Be a man," and then lunged at him, striking him in the chest.

The sentence indicates that Williams, the appellant, said "Be a man" to Edwards, the dead man. But, in fact, these words were said by the deceased to Williams.

The confusion as to who said the words comes from the first time they were quoted at the trial. Testifying was Robinson, the news reporter witness:

> And I saw a man with his hands open. [Edwards] making gestures to another man who was -- who had his hands in his pockets [Williams].
>
> I couldn't hear all of the argument but I saw the man with his hand in his pocket -- after the man was making these gestures with his hands, I did hear him say, "Be a man." (Tr. p. 63)

At this point it is unclear to which of the two men the witness is attributing the quote, "Be a man."

Subsequently in the testimony of Robinson the ambiguity is resolved:

> Q. Did you have an occasion to see the hands of the individual that you saw the blood gushing out of?
>
> A. I saw his hands at all times. He was making gestures (indicating) something to that effect.

Q. Did you hear him say anything?

A. I heard him tell the man, "Be a man. Be a man." (Tr. p. 67)

The quote in question is one of great import in the determination of the appeal. Judge Wright's inclusion of the words in his summation of the facts is evidence of their significance.

A basic argument of the appeal is that there is insufficient evidence to justify a conclusion that the appellant was exhibiting anger in his confrontation with Edwards and that his action was an aggressive rather than a defensive act. The appellant urged that the evidence given is as consistent with a feeling of fear on the defendant's part as with a feeling of anger.

The words in question were said at the central point of the controversy -- in the moments before the stabbing. They were the only words that the crucial witness, Robinson, could make out in the conversation between the two men during this time span. As such, they gave what is a vital insight into the thinking of the men at that moment. The entire defense of appellant is predicated upon his testimony -- that his state of mind at the time of the act was one of fear not anger. The case hinges on what his attitude and motivation were during the moments before he stabbed Edwards.

When the Court says that appellant said to Edwards, "Be a man" and then lunged at him, striking him in the chest, it is including these words as evidence of the belligerent frame of mind of Williams at that instant. Surely the knowledge that it was Edwards rather than Williams who said the words will alter the Court's perception of this crucial sequence.

Appellant feels that if the Court reconsiders the case with the words "Be a man" placed in proper perspective, it will agree that "there must be [a reasonable] doubt in a reasonable mind" (Curley v. United States, 81 U.S. App. D. C. 389; 160 F. 2d 279, 232 (1947)) as to whether the appellant acted in self-defense and therefore that the conviction must be reversed.

John C. Scott

1730 Rhode Island Avenue, N.W.
Washington, D. C. 20036

Attorney for Appellant
(Appointed by this Court)

October 23, 1968

Certificate of Counsel

Washington, D. C.
October 23, 1968

Pursuant to Rule 26 of the Court, I hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay.

John C. Scott

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABRAHAM WILLLIAMS, Appellant v. UNITED STATES OF AMERICA, Appellee	No. 21362

CERTIFICATE OF SERVICE

I, John C. Scott, do hereby certify that I have today served Appellant's petition for re-hearing in the above case, mailing copies thereof, postage prepaid, to:

David G. Bress, Esq.
United States Attorney
United States Courthouse
Washington, D. C. 20001

J. James McKenna, Esq.
Assistant United States Attorney
United States Courthouse
Washington, D. C. 20001

October 23, 1968.

John C. Scott

1730 Rhode Island Avenue, N.W.
Washington, D. C. 20036

Attorney for Appellant
(Appointed by this Court)